INDEX

CITATIONS

Cases:

62-2013 62—1

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 542

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix A to this motion, *infra*, pp. 1a–5a.

STATEMENT

This is a direct appeal from a final judgment entered on July 18, 1961, by a three-judge district court dismissing appellants' complaint seeking to set

aside orders of the Interstate Commerce Commission issued under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5.[1]

Appellant L. Nelson & Sons Transportation Co. ("Nelson Co.") is a common carrier by motor vehicle, authorized by the Commission to transport specified commodities associated with the manufacture of cloth by irregular routes between certain points in New England and certain other points in New England, New York, New Jersey and Pennsylvania. Appellant Gilbertville Trucking Co., Inc. ("Gilbertville Co."), is a comon carrier authorized to carry general commodities over regular and irregular routes within Massachusetts and over irregular routes between certain points in Massachusetts and certain points in New York, New Jersey, Connecticut and Rhode Island, and to carry specified commodities over some regular and some irregular routes between certain points in New England, New York, New Jersey and Delaware.

On October 6, 1955, by application filed in Docket No. MC-F-6099 under Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), the two companies sought authority for Nelson Co. to acquire

[1] In their jurisdictional statement, appellants have printed the judgment and opinion of the court below (J. St. A-1 to A-23) and the proposed report of the Commission's hearing examiner (J. St. A-24 to A-81). They have cited the published Motor Carriers Cases for the report of the Commission's Division 4, decided on exceptions to the examiner's report, and the report of the full Commission, on reconsideration of the Division 4 report, which was the decision reviewed below. The latter two reports and the Commission's order of June 9, 1959, are set forth in Appendix B to this motion, *infra*, pp. 1b, 17b, 34b, and will be cited herein as "App." plus the page reference.

control of Gilbertville Co. through purchase of the latter's capital stock, and for the merger of Gilbertville Co. into Nelson Co. Appellants Clifford J. O. Nelson and Charles G. Chilberg, who jointly controlled Nelson Co. through stock ownership, joined in the application. Various rail and motor carriers intervened in opposition to this application.

By order of December 20, 1955, in Docket No. MC–F–6178, the Commission's Division 4 instituted an investigation under Section 5(7) of the Act, 49 U.S.C. 5(7), to determine whether control or management of Gilbertville Co. in a common interest with Nelson Co. may have been effectuated and may be continuing without Commission authorization, in violation of Section 5(4) of the Act, 49 U.S.C. 5(4). All of the appellants were named as respondents in the investigative proceeding (J. St. A–25).

After a consolidated hearing in the above dockets, the hearing examiner issued his proposed report on June 6, 1957 (J. St. A–24). On his review of the evidence concerning the transactions of and relations between the parties, the examiner found that "control and management in a substantial degree of Nelson and Gilbertville in the common interest of Nelson

---

[*] The positions held by the individual appellants at the time of the hearing were as follows: Charles G. Chilberg, president, treasurer and a director of Nelson Co.; Clifford J. O. Nelson, secretary, assistant treasurer and a director of Nelson Co.; Greta C. Carlson, vice-president and a director of Nelson Co.; and Kenneth A. H. Nelson, president, treasurer and beneficial owner of all stock of Gilbertville Co. All four are children of Mrs. Linnea Chilberg Nelson, deceased.

and its shareholders and of Gilbertville and its shareholders have been accomplished or effectuated and presumably are being maintained" in violation of Section 5(4) of the Act (J. St. A–69). He found further that the appellants had effectuated such common control "and that all of them participated in the continuance of such control and management in violation of Section 5(4) of the act" (J. St. A–80). Nevertheless on the ground that this and other violations appeared to result from "ignorance" or "a degree of carelessness" rather than "wilfulness," the examiner stated that "a finding of unfitness by reason of violations is not warranted" (J. St. A–72). He recommended, therefore, that the Commission grant the merger application in MC–F–6099, under certain conditions (J. St. A–79), and discontinue the investigation proceeding in MC–F–6178 (J. St. A–79–80).

Upon exceptions, the Commission's Division 4 issued its report and order on February 26, 1958 (App. 1b–16b; 75 M.C.C. 45). The division concurred in the examiner's conclusion that the appellants had violated Section 5(4) of the Act, noting that none of the parties had challenged the examiner's findings of unlawful control (App. 5b, 11b, 14b). However, contrary to the examiner's recommendation, the division found no excuse for these violations. It ruled that "[c]onsidering all the circumstances" including the long experience of the companies' principals in regulated carriage, the violation "should not be 'blessed' by approval." Division 4 denied the merger application and directed the termination of the unlawful common control (App. 15b–16b).

The two proceedings were thereafter reopened by the division for reconsideration, and then transferred to the full Commission (App. 19b). The entire Commission issued its report and order on reconsideration on June 9, 1959 (App. 17b–33b, 34b–35b; 80 M.C.C. 257). The Commission affirmed the findings of violation and found "that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of Section 5(4) of the Interstate Commerce Act" (App. 29b–30b, 32b). In that connection, it found that Kenneth Nelson, who purchased the entire capital stock of Gilbertville Co. in 1953, was then "affiliated" with Nelson Co. within the meaning of that term in Section 5(6) of the Act (App. 29b); Section 5(5) provides that such acquisition by a person "affiliated" with another carrier "shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers" in violation of Section 5(4). The Commission also affirmed Division 4's determination that the merger should be denied and the parties directed to terminate the unlawful control and management in a common interest (App. 30b–32b). ~~Two~~ Three Commissioners dissented. The order entered on June 9, 1959, required appellants to terminate their violation and to divest themselves of stock in Gilbertville Co. within 60 days (App. 34b–35b).*

* This order of June 9, 1959 has not yet taken effect. Nelson Co. and Gilbertville Co. thereafter filed with the Commission a petition for reconsideration of its report and order, which was denied by order of February 15, 1960. Nelson Co. then

By its opinion and judgment of July 7, 1961, the district court dismissed the appellants' complaint and sustained the Commission's action (J. St. A–1 to A–23; 196 F. Supp. 351). The court (per Judge Wyzanski) held that the Commission's findings were "satisfactory not merely in form but in substance" and were supported by the record. (J. St. A–17). It further held that the subsidiary findings established a violation of Section 5(4), the Commission's conclusion being "not merely reasonable but inevitable" (J. St. A–18–19). The court noted particularly that "purposeful dovetailing for a common set of ends" was shown by the convergence of "[m]any phases" of the business of Nelson and Gilbertville Cos., beginning with the purchase of Gilbertville Co. by Kenneth Nelson "at a moment when he is not shown to have severed a relationship to the arterial traffic nerve of" Nelson Co. (J. St. A–18–19). This determination did not "require resort to any legislatively enacted definitions or pre-

---

filed a petition seeking voluntary cancellation of its own outstanding operating authority, upon the condition that the Commission would vacate its orders of June 9, 1959, and February 15, 1960. On July 5, 1960, the Commission denied this Nelson Co. petition, and ordered the date for compliance to be effective 15 days thereafter. After the instant action was filed in the district court on August 5, 1960, the Commission postponed the effective date for compliance until its further order.

While the complaint below was directed in terms to the orders of the Commission on June 9, 1959, February 15 and July 5, 1960 (see J. St. A–9, A–23), the substantive issues are all presented by the order of June 9, 1959, set forth at App. 34b–35b.

sumptions," although it was confirmed by such provisions in the Interstate Commerce Act (J. St. A–19–20).

Finally the court held that the Commission properly exercised its discretion to choose an appropriate remedy for violation of Section 5(4). The order of divestiture had a "fitness so perfect" to the offense, and the Commission's refusal of "lawful unification" to "a relationship already in part achieved by unlawful conduct is a clearly proper exercise of a delegated discretionary authority" (J. St. A–22–23).

ARGUMENT

This case presents no issue warranting plenary consideration by this Court. The only issues are: (1) whether the Commission correctly found a violation of the Interstate Commerce Act, in that Nelson Co. and Gilbertville Co. were put under common control without Commission authorization; and (2) whether this violation was a proper ground for denying an application for merger of the companies and for directing divestiture of stock interests in Gilbertville Co. by the other appellants. These two questions were properly answered in the affirmative by the district court. The Commission's subsidiary factual findings have never been contested by appellants, and there is no inconsistency in legal theory between the Commission and district court.

1. As the court below stated, this case has throughout presented "one dominant issue of fact * * * the issue of common control" (J. St. A–18). On this point, the record has been canvassed by the hearing examiner, the Commission's Division 4, the full Commission, and the district court. All have agreed that Nelson and Gilbertville Cos. were controlled or managed in a common interest, without Commission approval, in violation of Section 5(4) of the Act. In the circumstances, there is no occasion for this Court to undertake a plenary review of the facts.

The ultimate finding of unlawful common control rests securely on numerous subsidiary findings, nearly all of which were first set forth in the examiner's proposed report and, as the Commission and Division 4 noted, have never been challenged by the appellants (App. 5b, 11b, 26b). These findings include the joint use by Nelson and Gilbertville Cos. of terminals and telephone numbers; various arrangements by which the companies drew freely on each other's vehicles and drivers; the pooling and commingling of shipments to suit their convenience; arbitrary division of revenues from interline carriage according to a fixed formula, instead of the usual trade practice of computing the actual length of the companies' respective hauls; the "extremely liberal" handling of inter-company debit balances; and various activities engaged in by officials and employees of each company for the benefit of the other. See the statements of the examiner, J. St. A–38–46, 69; Division 4, App. 11b–14b; Commission,

App. 26b–30b; district court, J. St. A–10–16, 18–19. As the district court found, the convergence of the business of the two companies commenced with the purchase by Kenneth Nelson of Gilbertville Co. in March 1953 (J. St. A–18–19).

Appellants misconstrue the opinions below when they argue that the district court sustained the Commission's order on grounds entirely different than those relied upon by the Commission (J. St. 11, 20–21). Thus, appellants argue that the Commission found facts showing the type of unlawful common control prohibited by Sections 5(5) and 5(6) whereas the district court found that the facts showed an unlawful common control of different description prohibited by Section 5(4). But appellants overlook the fact that both court and Commission found unlawful common control in violation of Section 5(4). Moreover, they disregard the legislative history which shows that Section 5(4) declares unlawful all types of common control of which the situations set forth in Sections 5(5) and 5(6) are but specific examples.

The Commission found that Kenneth Nelson was "affiliated" with Nelson Co. when he purchased Gilbertville Co. and that the statutory presumption of Section 5(5) applied—the acquisition of one carrier by a person "affiliated" with another is "deemed to accomplish or effectuate" unlawful common control. But the Commission also specifically "affirm[ed] the findings" of Division 4 and the examiner,

both of which had found unlawful common control in violation of Section 5(4) without utilizing the presumption (App. 29b–30b). The district court held that the statutory presumption, resting on Kenneth Nelson's affiliation with Nelson Co. in 1953, "confirmed" the independent finding of unlawful control based upon the activities of and relations between the two carriers since that time (J. St. A–19). Moreover, contrary to appellants' contention (J.S. 23–27), the record clearly supports the conclusions of the court and the Comission that Kenneth Nelson was "affiliated" with Nelson Co. when he purchased Gilbertville Co. on March 2, 1953.[4]

---

[4] Section 5(6) provides that a person is "affiliated" with a carrier if, because of his relationship, "the method of, or circumstances surrounding organization or operation" and other factors, "it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

In 1951, Kenneth Nelson resigned from Nelson Co. and sold his stock interest. However, he continued to maintain an office on Nelson Co. premises, allegedly as a "free lance" tariff consultant, but having only one client, Nelson Co., from which he received substantial sums in 1952 and 1953 (J. St. A–11–13, 63–65, App. 12b, 27b). The Commission's opinion states that Kenneth Nelson's consultant services ended on March 1, 1953, one day before he purchased Gilbertville (App. 27b). Nevertheless, the transaction was developed earlier (J. St. A–64). The circumstances at that time support, and the subsequent developments confirm, the reasonableness of the conclusion that Gilbertville would be (Section 5(6)) "managed in the interest of" Nelson Co., and hence that Kenneth Nelson and Nelson Co. were affiliated.

The district court, on examination of the record, found additional proof of "affiliation" in the evidence found by Division 4 (App. 12b) that Kenneth Nelson's employment by Nelson Co. actually continued past the date on which Gilbertville was

The legislative history cited by appellants is contrary to their contention that the presumptions in Section 5(5) and the definition of affiliation in Section 5(6) describe situations "not otherwise comprehended by" the prohibition of unlawful common control in Section 5(4) (J. St. 20). The Senate Report states that Section 5(5) and 5(6) were "designed to spell out and make clear the various possible forms of indirect control * * * which paragraph [5(4)] is intended to prohibit." S. Rep. 87, 73d Cong., 1st Sess., p. 9. In other words, Congress was putting its own gloss on the prohibition of unlawful common control in Section 5(4) in order to prevent evasion through the use of intermediates. The report continues (pp. 9–10):

> These paragraphs have been planned in the light of what has already been done through myriad devices without commission supervision and in defiance of the will of Congress. They are necessary because of the difficulty in establishing as a matter of law, in many cases where as a matter of fact it is known, that control or management in a common interest of two or more carriers is effectuated or actually exists.

---

purchased (J. St. 11). Like other immaterial variations between the district court's factual statement and the administrative findings, this difference does not detract from the common findings that appellants had violated the Act.

[1] As originally enacted as part of the Emergency Railroad Transportation Act of 1933, and as cited in the above report, the present Sections 5(4), 5(5) and 5(6) were numbered 5(6), 5(7), and 5(8). 48 Stat. 218. The paragraphs were renumbered to their present arrangement in the Transportation Act of 1940, 54 Stat. 905, 907–908.

> The provisions of paragraph [(4)] would be of little effect unless the language contained therein were construed to include control or management effectuated or exercised indirectly through the use of legal devices such as holding companies, voting trusts, and combinations of affiliated interests. It is therefore intended by the provisions of paragraph [(5)], [(6)] * * * to make sure that paragraph [(4)] covers such types of control and management.

See, also, Hearings on H.R. 9059 Before House Committee on Interstate and Foreign Commerce, 72d Cong,. 1st Sess. (1932), pp. 32–34; *Greyhound Corp.—Investigation of Control—Southern Ltd.*, 45 M.C.C. 59, 77–78.

2. Having found appellants in violation of Section 5(4), the Commission has explicit authority "to require [them] to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation." Section 5(7), 49 U.S.C. 5(7). This broad discretion clearly sustains the Commission's requirement of divestiture by the other appellants of their interests in Gilbertville Co.

The standard for review of administrative remedies may aptly be taken from cases dealing with the Federal Trade Commission, another agency having "wide discretion in its choice of a remedy deemed adequate to cope with * * * unlawful practices." The rule is "The courts will not interfere except where the remedy selected has no reasonable relation to the unlaw-

ful practices found to exist." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 392–393.

The unlawful practice here was the unauthorized acquisition of common control in two carriers, see *infra*, pp. 14–15. Nelson Co. was the original trucking business of the individual appellants, and the violation occurred when Gilbertville Co. was acquired by one of those "affiliated" with Nelson Co., and was operated "in a common interest" with Nelson Co. Appellants suggest an alternative remedy of separating Gilbertville's principal, appellant Kenneth Nelson, from Nelson Co. (J. St. 33). In view of the close relations between the appellants, and their illegal common activities heretofore, such a requirement would be ineffective to cure the violations found.

The district court properly relied on (J. St. A–22) *United States* v. *du Pont & Co.*, 366 U.S. 316. In that case, the Court noted that under the antitrust laws where the "heart" of a violation is "intercorporate combination and control," "[d]ivestiture or dissolution has traditionally been the remedy." 366 U.S. at 329. Analogously, in this case, as the court below ruled, "divestiture has a fitness so perfect that the order not merely is obviously a suitable exercise of discretion, but needs no gloss." (J. St. A–22).[6]

[6] Petitioners' argument that "section 5(7) only authorizes the Commission to prevent further continuance of a continuing violation; it does not permit the Commission to punish,

3. Finally, the appellants' violation of Section 5(4) was a proper ground for denying the application to merge the two companies, Nelson and Gilbertville.

The evident purpose and effect of such violation is to achieve *de facto* merger without any governmental supervision and then, as the Commission put it, "to present a *fait accompli* for our approval." App. 31b; *Central Ry. of Georgia Control*, 307 I.C.C. 39, 43. The Commission pointed out that the Act requires it to pass upon "proposed" mergers or acquisitions of control, *i.e.*, "prior to consummation" and "including the justness and reasonableness of the terms upon which such control is to be acquired." If illegal premature acquisitions had to be countenanced, the Commission's "administration of the statute in the public interest

---

redress, or otherwise remedy a violation which is *fait accompli*" (J. St. 28), falls of its own weight. It is beyond dispute that in finding the *fait accompli* of unlawful common control, the Commission necessarily found a continuing violation of Section 5(4) which makes it "unlawful to continue to maintain [such] control or management * * *." This was all that was necessary to the exercise of the remedial powers conferred by Section 5(7). Further, despite appellants' contention to the contrary (J. St. 27–30), the Commission expressly found that the violation was presently "continuing" (App. 11b, 30b, 32b). This determination was supported by the subsidiary findings concerning the continuing character of the interrelationships and business practices of the two companies. *Supra*, pp. 8–9.

Divestiture has been the frequent remedy for violations of Section 5(4). *E.g., Houff—Control—Elliott Bros. Trucking Co.*, 80 M.C.C. 637; *Sellers—Control—Huckabee Transport Corp.*, 80 M.C.C. 429; *Black—Investigation of Control*, 75 M.C.C. 275.

would be seriously hindered, if not defeated." *Ibid.*

The threat is well illustrated in the instant case. The hearing examiner found that appellants had violated Section 5(4), but recommended that the merger should be approved, in part on the ground that adverse competitive effects of the merger were "either already an accomplished fact or capable of becoming so even though the present application is denied" (J. St. A–74). But this avoidance of the Commission's control over mergers by premature common control is precisely the evil against which Section 5(4) is aimed.

In passing upon merger applications, the Commission is authorized to consider all factors pertinent to a decision whether "the proposed transaction * * * will be consistent with the public interest" (Section 5(2)). Appellants concede that the Commission is not limited to the four specific considerations listed in that section (J. St. 37); this Court so held in *Schwabacher* v. *United States,* 334 U.S. 182, 193. In exercising its expert judgment of what the "public interest" requires under Section 5(2) (cf. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 88–89), the Commission could surely decide that violations of the prohibition against unauthorized merger in another paragraph of the same section "should not be rewarded" (App. 31b–32b). In the circumstances here, such violation warranted denial of the appellants' application for subsequent approval of "a relationship

already in part achieved by unlawful conduct" (J. St. A–23).[7]

---

[7] As Division 4 and the Commission noted (App. 15b, 30b–32b), the Commission now takes a more strict view of violations of Section 5(4) than in years past. The present rule was not, however, "created by the Commission in the present case" as appellants contend (J. St. 32), but was expounded in *Central Ry. of Georgia Control*, 307 I.C.C. 39, and applied in a number of other merger denials in recent years (*e.g.*, cases cited in footnote 6; *Powell—Purchase—Rampy*, 57 M.C.C. 597). In any event, the reasonableness of the decision would not be impaired even if it represented a new turn of policy. *Federal Communications Commission* v. *WOKO*, 329 U.S. 223, 227–229.

CONCLUSION

The issues in this case were correctly decided by the district court and by the Commission. There is no substantial question warranting plenary consideration by this Court. The judgment of the district court should be affirmed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
Attorney.

ROBERT W. GINNANE,
General Counsel,

JAMES Y. PIPER,
Assistant General Counsel,
Interstate Commerce Commission.

JANUARY 1962.

APPENDIX A

Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, provides in pertinent part:

* * * * *

(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *

* * * * *

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the

Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided,* That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier and employees affected.

* * * * *

(4) Control effected by other than prescribed methods.

It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used in this paragraph and paragraph (5) of this section, the words "control or management" shall be construed to include the power to exercise control or management.

(5) Transactions deemed to effectuate control or management.

For the purposes of this section, but not in anywise limiting the application of the provisions thereof, any transaction shall be deemed to accomplish or effectuate the control or management in a common interest of two carriers—

(a) if such transaction is by a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(b) if such transaction is by a person affiliated with a carrier, and if the effect of such transaction is to place such carrier and persons affiliated with it, taken together, in control of another carrier;

(c) if such transaction is by two or more persons acting together, one of whom is a carrier or is affiliated with a carrier, and if the effect of such transaction is to place such persons and carriers and persons affiliated with any one of them and persons affiliated with any such affiliated carrier, taken together, in control of another carrier.

(6) Affiliation with a carrier defined.

For the purpose of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier.

(7) Investigation by Commission of effectuation of control by nonprescribed methods.

The Commission is authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4) of this section. If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this chapter; and with respect to any violation of paragraphs (2)–(12) of this section, any penalty provision applying to such a violation by a common carrier subject to this chapter shall apply to such a violation by any other person.

* * * * *

623913—62——4

APPENDIX B

MF-2322

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099 [1]

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL AND MERGER—GILBERTVILLE TRUCKING CO., INC.

Decided February 26, 1958

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management, and operation, and for the acquisition by Clifford J. O. Nelson and Charles G. Chilberg of control of the operating rights and property through the control and merger, denied.
2. In No. MC-F-6178, upon investigation, the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., found to have been effectuated and to be continuing in violation of section 5(4), Interstate Commerce Act. Order entered directing termination of such violation.

Mary E. Kelley for applicants and respondents.

Francis E. Barrett, Francis E. Barrett, Jr., Robert G. Bleakney, Jr., Hugh M. Joseloff, William Q. Keenan, James G. Lane, T. W. Murrett, Arthur J. Piken,

[1] This report embraces No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

and *Kenneth B. Williams* for protestants in No. MC–F–6099 and interested parties in No. MC–F–6178.

Ellis V. Gregory, Nell Guinn, and *Herman F. Mueller* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS WINCHELL, MINOR, AND WALRATH

BY DIVISION 4:

Exceptions were filed by applicants, the Bureau of Inquiry and Compliance, hereinafter called the Bureau, and certain rail and motor protestants to the examiner's proposed report in No. MC–F–6099, and applicants and the protestants replied to each other. Applicants' exceptions contain a petition requesting a waiver of rule 1.86 of the General Rules of Practice for the reasons hereinafter stated. Our conclusions in No. MC–F–6099 differ from those of the examiner.

The L. Nelson & Sons Transportation Co., of Ellington, Conn., and Gilbertville Trucking Co., Inc., of Gilbertville, Mass., hereinafter called Nelson and Gilbertville, respectively, by joint application filed October 6, 1955, in No. MC–F–6099, seek authority under section 5 of the Interstate Commerce Act for (1) the acquisition by Nelson of control of Gilbertville through purchase of its capital stock, and (2) merger of the operating rights and property of the latter into the former for ownership, management, and operations. In the same application, Clifford J. O. Nelson, of Dover, Mass., and his half brother, Charles G. Chilberg, of Rockville, Conn., who control Nelson through equal ownership of 91.5 percent of its outstanding capital stock, seek author-

ity under the same section to acquire concurrent control of Gilbertville's operating rights and property through the transaction. Nelson and Gilbertville operate more than 20 motor vehicles.

In No. MC–F–6178, the Commission, division 4, on its own motion, by order entered December 20, 1955, instituted an investigation under section 5 (7) of the Interstate Commerce Act to determine whether control or management of Gilbertville in a common interest with Nelson may have been effectuated and may be continuing in violation of section 5 (4) of the act. Gilbertville, Nelson, Clifford J. O. Nelson, Charles G. Chilberg, Greta C. Carlson, a sister, and Kenneth A. H. Nelson, a brother, were made respondents.

A hearing of the two proceedings on a consolidated record has been held, at which 13 motor common carriers[2] and rail carriers in eastern territory opposed the application and appeared as interested parties in the investigation. The applicants-respondents, the motor-carrier protestants, and the Bureau introduced evidence. Briefs were filed by the applicants-respondents, the Bureau, and by all but the last six named motor-carrier protestants. No exceptions are taken by the parties to the factual statements in the examiner's report, and they are adopted as our own without being restated, except to the extent necessary for clarity.

---

[2] The Adley Express Company, Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Hemingway Bros. Trucking Co., M&M Transportation Company, Newburgh Transfer, Inc., F. B. Mutrie Motor Transportation, Inc., Taylor's Express Co., Jackson Transportation Corp., Lombard Bros., Inc., National Transportation Co., Downing and Perkins, Inc., H. T. Smith Express Co., and Westchester Motor Lines, Inc.

Nelson and Gilbertville are motor common carriers. The former holds irregular-route rights to transport principally materials used in the manufacture of cloth, waste materials resulting therefrom, and supplies and materials used in connection therewith, between specified points in Massachusetts and specified points in New Hampshire and Rhode Island, and between certain Rhode Island and Connecticut points and an area comprising approximately the eastern two-thirds of Massachusetts, on the one hand, and, on the other, New York, N.Y., certain New Jersey points, and Philadelphia, Pa. Gilbertville holds rights to transport general commodities (1) over numerous combinations of regular routes between Lowell and Boston, Mass., and (2) over irregular routes principally (*a*) between points in Massachusetts, (*b*) between the town of Hardwick, Mass., on the one hand, and, on the other hand, New York City and points in New York and New Jersey within 20 miles thereof, and (*c*) between Palmer, Mass., and points within 10 miles thereof, on the one hand, and, on the other, points in Connecticut and Rhode Island. It may also transport certain specified commodities. Since about March 1953, all of Gilbertville's outstanding stock has been owned by Kenneth Nelson, or persons closely identified with him or with Nelson.

Under the transaction in No. MC–F–6099, Nelson would acquire all of Gilbertville's outstanding stock, exchanging therefor shares of its own stock having an aggregate net book value equal to the aggregate net book value of Gilbertville's stock as of the date of consummation. Nelson would then take over all the assets and assume all the liabilities of Gilbertville and surrender its charter for cancellation. Had the transaction been effected July 31, 1956, Kenneth Nel-

son would have received 78 shares of Nelson's stock in the exchange.

Although finding that the respondents had effectuated and were continuing the control or management of Gilbertville in a common interest with Nelson in violation of section 5(4), the examiner further found that the proposed stock acquisition by Nelson, to be followed by the merger, would be consistent with the public interest, provided that the usual condition respecting amortization were imposed, and provided that the cancellation of certain unexercised authority of Gilbertville coincidentally with consummation were required. As to the unlawful common control, he expressed the view that the facts developed of record placed that question on the "borderline" but that, notwithstanding no single act, practice, or arrangement between the applicants-respondents established such unlawful control, the cumulative effect of the closely related factors, and the circumstances surrounding them, require such a finding. He concluded, however, that the evidence did not establish that the violations shown and the circumstances under which they occurred were the result of a persistent disregard for regulation, but stemmed from ignorance and carefulness, rather than from any willfulness on the part of the respondents. As to the proposed merger, he found that savings in transportation costs and improvements in service resulting therefrom were desirable in the public interest, and warranted approval of the transaction.

None of the parties challenges the examiner's findings of unlawful control, the applicants-respondents' only comment thereon in their exceptions being that they are perplexed by his findings in this regard. However, in order to preserve their rights as provided under rule 1.87 of the General Rules of Practice,

herein called the rules of practice, applicants-respondents, in their exceptions, renew their objections to rulings by the presiding examiner at the hearing which they describe as follows: (1) in directing that the hearing in No. MC–F–6099 go forward first, (2) in permitting the opposition under the guise of cross-examining applicants' witnesses therein to propound questions to bolster their position in the investigation proceeding, (3) in permitting certain testimony of a hearsay nature to be made a part of the record, (4) in prohibiting respondents' counsel from cross-examining certain witnesses respecting regulations of this Commission, and the law applicable to the matters alleged to have been unlawful, (5) in permitting an examination on and the introduction in evidence of a certain undated teletype message, and (6) in failing to accept certain financial data tendered. Under rule 1.74 of the rules of practice, the presiding officer has the option of determining whether on a consolidated record an application or investigation proceeding is to be heard first, and, in our opinion, his ruling here did not prejudice the parties. We have examined the facts pertinent to the other contentions and the examiner's rulings thereon and find that, except with respect to the teletype message, discussed later, the contentions of applicants-respondents are not justified.

In our opinion, the examiner should not have received in evidence as an exhibit copy of the teletype message, or authorized the taking of testimony in regard thereto, over the applicants-respondents objection. The message is undated, the sender and receiver and the location of the sending and receiving points are not identified, the message itself is incoherent and incomplete, and there is no evidence showing that the directives therein were actually put into

effect. We accordingly have disregarded the aforesaid exhibit and testimony relating thereto in the disposition of these proceedings.

Among Gilbertville's operating rights directed to be canceled by the examiner, should the merger be consummated, are those authorizing the transportation of sanitary napkins, facial tissues, and paper boxes, over a regular route between New York City and Wilmington, Del., over U.S. Highways 1 and 13, serving the intermediate point of Philadelphia and the off-route point of Rockland, Del. Applicants urge that these operating rights also be authorized to be retained by Nelson, contending that the Commission in granting these and similar rights (irregular-route general-commodity rights between the town of Hardwick and New York City) recognized that the shippers of such products were entitled to a complete service, and that Gilbertville has performed the service, several Wheelwright, Mass.-Philadelphia shipments having been shown to have moved by its line as far south as New York City and there interchanged, and one through shipment having been moved by it in the reverse direction from Rockland to Wheelwright. They do not object to the other cancellations proposed by the examiner. In their petition accompanying their exceptions, applicants request waiver of rule 1.86 of the rules of practice in order to incorporate as part of the record an accompanying list of shipments of napkins and tissue represented as having been handled by Gilbertville under the above rights at various times between June 15, 1956, and May 29, 1957, both inclusive. Protestants object to the introduction of this additional information at this late date, certain rail protestants contending that under the above rule arrangements for such supplementation of the record

should have been made before the close of the hearing. Rule 1.86 provides, in part, that, except as directed by the presiding officer at the hearing, or as expressly permitted in particular instances, the Commission will not receive in evidence or consider as part of the record any documents submitted for consideration after the close of the hearing. As pointed out by certain motor protestants, all the shipments in the list moved long after the instant application was filed, in fact only 10 moved before the close of the hearing. In view of the above, and protestants' objections to the receipt of the additional information at this late date, applicants' petition is denied. In view of our conclusions, it is unnecessary to consider further applicants' contention with respect to the regular-route special-commodity rights just described.

Protestants and the Bureau except to the examiner's findings that the section 5 application should be approved, contending that instead it should be denied because of the unfitness of the parties. They argue that he erred in finding that the violations do not establish a persistent disregard for regulation, but have been the result of ignorance and carelessness and not willfulness; in excusing the violations on the grounds of youth and inexperience; in concluding that a finding of unfitness by reason of the violations was not warranted; and, finally, in failing to recommend a divestiture in view of the findings that section 5(4) had been and is being violated. The protestant carriers also argue that the examiner erred in failing to find that the transaction as proposed would adversely affect existing carriers. As to the violations, protestants and the Bureau assert that, although young in years, the Nelson and Gilbertville officers are old in experience, and that to approve the control and merger would be tantamount to issuing an invitation

to carriers that all they have to do is consummate with the assurance that a liberal Commission will bless their *coup d'etat*. They urge that the examiner has failed to appreciate that a new pattern of operations built upon a prior unlawful assumption of control is entitled to no more consideration than dormant operations, and, as to his conclusion that the competition feared by protestants is either already an accomplished fact or capable of becoming so regardless of whether the transaction is approved, protestants maintain this would be a good argument and entitled to consideration if based on a legitimate competitive envolvement, which is not the case here. They also state that another reason for denial is the difficulty of policing the unified operations, both from the standpoint of seeing that appropriate gateways are used and only lawfully authorized traffic is transported, which difficulties they urge outweigh any possible public benefits, indeed the present textile products handled direct by Nelson might be delayed by reason of their being commingled in the same equipment with Gilbertville's other authorized commodities which require routings through circuitous gateways.

In their reply, applicants-respondents assert that none of the exceptants questions Nelson's financial fitness, and that both it and Gilbertville have excellent safety records. They urge that the leasing by Gilbertville of certain of Nelson's equipment and terminal facilities, the part-time employment by each of the same drivers within the same pay period, the maintenance of duplicate medical certificates for drivers in the files of each carrier, the billing by Nelson of all shipments interlined with Gilbertville, and the finding of relatively few Gilbertville shipments moving with Nelson's shipments on the latter's trailers do not provide a sufficient basis for finding that the

applicants are unfit. They state that numerous carriers have been found to be fit, notwithstanding they lease equipment, use common terminals, and employ some of the same personnel, such as drivers and accountants; that some of the drivers here are also hired part time by other carriers, which, with the keeping of duplicate medical certificates, is generally a recognized practice in the industry; that there is no regulation prescribing which carrier actually must prepare the billing for shipments; and as to certain of Gilbertville's traffic alleged to have been commingled with Nelson's traffic, attention is called by the parties to the fact that one shipment involved an intrastate movement, and as to certain other traffic it is impossible to determine from the record whether such shipment was being actually used in the textile industry, but, if so, Nelson could have handled the shipment under its own rights. They contend that as to the one incident where a teletype message was destroyed, it is obvious that the Commission representative was convinced that the person guilty of the act was not then familiar with Commission regulations requiring their preservation, thus supporting the examiner's finding that the act of destruction was not willful. They argue that when considering the substantial volume of traffic handled by Nelson and Gilbertville, the many carriers with which each interlines, and the keen competition among the carriers in the New England area, it is inconceivable that any substantial deviation from this Commission's regulations would escape the attention of competitors and would remain unreported. They assert that it is significant here that not one protestant has offered evidence of its own concerning a violation. Respecting the resulting circuitous operations, applicants-respondents state that protestants have completely overlooked the fact that the slight

increase in operating expenses by operating circuitously (estimated by counsel to be approximately 28 miles longer via the Hardwick gateway than via the shortest route between Boston and New York City) would be more than offset by the increased revenues from operating loaded trailers instead of the partial loads of textile products now transported by Nelson. They state that the examiner recognized that an approval and consummation of the transaction as proposed under section 5 would terminate the practices which have been found objectionable, and that, should this Commission conclude to deny the application, there would be no necessity for the entry of a cease and desist order, as applicants-respondents have taken and will voluntarily take corrective action to eliminate the objectionable practices and conditions. Finally, they urge that protestants have taken no exceptions to the examiner's findings that no particular loss of traffic by protestants has been shown as a result of the applicants respondents operations, and that the economies and improvements in service resulting from the unification, as found by the examiner based on the evidence, clearly meet the requirements of the law and warrant his ultimate finding that the transaction would be consistent with the public interest.

As previously stated, no party of record excepts to the examiner's findings that the respondents have effectuated or participated in the effectuation of the control and management of Nelson in a common interest with Gilbertville in violation of section 5 (4), and that the violation is continuing. In view of our conclusions herein, it appears desirable to restate briefly certain of the salient facts providing the basis for that finding. The 4 individuals named as respondents are the children of Mrs. Linnea Nelson, deceased, and with 3 other children hold an equal number of shares

of stock in Bergson Company, a real estate holding company, hereinafter called Bergson. Respondent Kenneth Nelson's connection with Nelson as an officer, director, and stockholder was terminated in September 1951, when he sold his 50 shares of its stock to his brother, Clifford. An additional 42 shares of Nelson's stock which he had inherited from his mother were, pursuant to an agreement executed in September 1951, also transferred to Clifford immediately following a distribution of the estate in January 1953. Kenneth Nelson did not, however, entirely disassociate himself from Nelson in 1951 following the above stock sale. He continued to have an office at its Connecticut headquarters, and, during 1952, before his purchase of Gilbertville's stock, received a salary of $15,650 from Nelson as its "free lance" tariff consultant. Such employment continued in 1953 even after he had acquired Gilbertville's stock on March 1, 1953, and resulted in the payment of a salary to him by Nelson aggregating $13,829.

Bergson's properties include three terminals, one being Nelson's Connecticut headquarters and leased to it. Nelson in turn sublets space therein to Gilbertville. Another independently owned terminal located at New York City, is used by Nelson, Gilbertville, R. A. Byrnes, Incorporated, a motor carrier which is controlled through stock ownership by Clifford Nelson and Charles Chilberg, and by another carrier. Nelson and Gilbertville have the same telephone numbers at seven locations connected by leased interterminal lines, the total rental payments being initially borne by Nelson which is then partially reimbursed by Gilbertville.

Gilbertville regularly leases motor vehicles from Nelson, and at its own Gilbertville terminal, and the shared terminal in Connecticut maintains lists of

Nelson-owned equipment and prepared lease forms to facilitate the leasing of equipment. At the same point it has a complete file of doctors' certificates for all Nelson's drivers. On a number of occasions the same driver has been employed by both Nelson and Gilbertville during the same pay period. If Nelson or Gilbertville is handling a shipment destined to a point on the lines of the other, it has been the practice in the past for a vehicle to be leased to the destination carrier by the origin carrier and to use the same driver to move the equipment through.

Nelson and Gilbertville have given favorable consideration to each other concerning intercompany accounts, Gilbertville receiving such consideration respecting equipment rentals owed Nelson, and Nelson respecting interline settlements due Gilbertville. At least 25 percent of the repairs on Gilbertville's motor vehicles have been made in Nelson's shop at the Connecticut terminal, where it also has prepared all billing on the shipments interlined with Gilbertville, whether the shipment was prepaid or collect and irrespective of which carrier originated the shipment. Although Nelson and Gilbertville interline traffic with numerous other carriers as well as with each other, where they provide the service jointly the division of the revenue remains constant regardless of the length of the haul, whereas, customarily, such divisions between carriers are on a mileage pro rata basis.

Aside from the question as to whether the above constitutes unlawful common control, Gilbertville or Nelson has on various occasions violated the provisions of section 206 and certain regulations promulgated under part II of the act, including the performance of transportation service beyond the scope of their operating authorities, failure to observe proper gateways for traffic interchange, destruction of rec-

ords, and failure to have certain safety equipment on motor equipment, or failure to maintain such equipment in safe operating condition.

We concur in the examiner's conclusion that Nelson and Gilbertville are controlled or managed in a common interest in violation of section 5(4), our finding in this respect not being based on any single factor or several selected from the whole, but on the entire chain of circumstances revealed by the record. Having so found, the question for determination is whether we nevertheless should approve the transaction as proposed under section 5, the consummation of which would automatically terminate such violation for the future. Closely associated with the above, is the question as to whether, in view of the violation, Nelson would be a fit person to conduct the unified operations. We have on numerous prior occasions approved transactions involving partial or complete consummation where we have been able to find that such act, although unlawful, had not been deliberately effectuated and the transaction otherwise would be consistent with the public interest. Clearly, however, action adverse to the interest of the applicants can be taken, based on a finding of a violation of section 5(4). This was done recently in *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, decided August 13, 1957. Also, as the acquiring party applicant's fitness, financial and otherwise, is an issue in a section 5(2) proceeding, the authority sought may be withheld, if the circumstances warrant, based on other violations. See *Powell—Purchase—Rampy*, 57 M.C.C. 597. It should also be observed that the act clearly intends that our consideration be given to "proposed" transactions under section 5. *Congdon—Purchase—Wadkins*, 50 M.C.C. 781. By premature consum-

mation, viz, effecting, as here, the unlawful control and management in a common interest, we are impeded in the discharge of our statutory duty to consider the entire transaction in all its aspects. *Texas, New Mexico & Oklahoma Coaches, Inc.—Pur.—Aaron*, 55 M.C.C. 269.

When regulation of motor-carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved, notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more than 20 years of regulatory experience, a more stringent approach is warranted, not as a penalty to these particular respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings. Charles Chilberg has been associated with Nelson or its predecessor since 1930. He and his half brother Clifford Nelson have been parties in other section 5 proceedings. See *L. Nelson & Sons, Transp. Co.—Purchase—White's Exp.*, 59 M.C.C. 675, and No. MC-F-5749, *Chilberg and Nelson—Control—R. A. Byrnes, Inc.*, 70 M.C.C.—(not printed in full), decided May 15, 1956. Kenneth Nelson, Gilbertville's principal stockholder, was associated with Nelson as long ago as 1948, and by the evidence herein has indicated that he is familiar with the obligations imposed on carriers under the act and prior decisions by the care with which he has been instructing Gilbertville's drivers in the use of specific gateway points when performing through opera-

tions under separately described portions of its authority. Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be "blessed" by approval in No. MC–F–6099, but rather, that respondents should be directed to terminate the unlawful control and management in a common interest. They will also be expected to cease the other violations. In view of our conclusions, it is unnecessary to consider other contentions of the parties.

We find, in No. MC–F–6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

We further find, in No. MC–F–6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, have participated in the effectuation of such control and management in a common interest, and that said respondents are participating in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER WINCHELL dissents.

MF-2429

INTERSTATE COMMERCE COMMISSION

No. MC-F-6099 [1]

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL AND MERGER—GILBERTVILLE TRUCKING CO., INC.

Decided June 9, 1959

Upon reconsideration:

1. In No. MC-F-6099, application of The L. Nelson & Sons Transportation Co., for authority to acquire control of Gilbertville Trucking Co., Inc., through purchase of capital stock, for merger into the former of the operating rights and property of the latter for ownership, management, and operation, and for the acquisition by Clifford J. O. Nelson and Charles G. Chilberg of control of the operating rights and property through the control and merger, denied.
2. In No. MC-F-6178, control and management of Gilbertville Trucking Co., Inc., in a common interest with The L. Nelson & Sons Transportation Co., found to have been effectuated and to be continuing in violation of section 5(4) of the Interstate Commerce Act. Order entered directing termination of such violation. Prior report, 75 M.C.C. 45.

Appearances as shown in the prior report.

[1] This report embraces No. MC-F-6178, The L. Nelson & Sons Transportation Co.—Investigation of Control—Gilbertville Trucking Co., Inc.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 75 M.C.C. 45, decided February 26, 1958, by division 4, (1) in No. MC–F–6099, authority was withheld under section 5 of the Interstate Commerce Act for the acquisition by The L. Nelson & Sons Transportation Co., of Ellington, Conn., of control of Gilbertville Trucking Co., Inc., of Gilbertville, Mass., hereinafter called Nelson and Gilbertville, respectively, through purchase of capital stock, the concurrent merger of the operating rights and property of Gilbertville into Nelson for ownership, management, and operation, and for Clifford J. O. Nelson, of Dover, Mass., and Charles G. Chilberg, Rockville, Conn., who control Nelson through ownership by each of 45.8 percent of its outstanding capital stock, to acquire control of Gilbertville through the transaction, and (2) in No. MC–F–6178, it was found that the control and management of Nelson and Gilbertville in a common interest had been effected and was continuing in violation of section 5(4) of the act; that the respondents, Nelson, Gilbertville, Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson had participated in accomplishing such control and management in a common interest and in its continuance; and that respondents should terminate the violation. An order was entered denying the application in No. MC–F–6099, ordering termination of the violation, and requiring certain respondents to report within 60 days the steps taken by each to comply.

By petition filed April 21, 1958, petitioners sought reconsideration of the report and order of February 26, 1958, or in the alternative, oral argument. Replies were filed by our Bureau of Inquiry and Compliance,

hereinafter called the Bureau, and joint replies were filed by (1) The Adley Express Company, M. & M. Transportation Company, and Hemingway Brothers Interstate Trucking Company, hereinafter called the Adley group, (2) P. B. Mutrie Motor Transportation, Inc., Alvin R. Holmes, doing business as Holmes Transportation Service and/or Jones Express, Newburgh Transfer, Inc., and Taylor's Express Co., hereinafter called the Mutrie group, and (3) Downing & Perkings, Inc., H. T. Smith Express Company, Lombard Bros., Inc., and National Transportation Company, hereinafter called the Downing group. A motion to strike portions of the petition of petitioners was filed by the Downing group, and a motion to strike the entire petition was filed by class I rail carriers in eastern territory, both on the basis that the petition contained redundant, immaterial, impertinent, or scandalous matter in violation of rule 1.4(d) of the Commission's Rules of Practice. The Downing group also alleged that the petition contained new material not properly for consideration at this time. Petitioners replied to the motions. Motions to strike portions of the replies of the Bureau and the Mutrie group were filed by petitioners, and the Bureau replied. By order of October 2, 1958, division 4 reopened the proceedings for reconsideration on the present record. We have recalled the proceedings from the division, for consideration and determination in this report. Contentions raised by the petitioners and protestants not detailed herein have been considered and are deemed without merit.

Petitioners argue that the motion of "Class I rail carriers" to strike their petition for reconsideration should be dismissed, as the complaining parties are not fully identified; that it is doubtful that all of the eastern railroads have agreed to the motion; and that

the rail-carrier protestants presented no evidence in the proceeding and their position is unknown. They also contend that the persons preparing the motion did not participate in the hearing and are unfamiliar with the matters involved. In our opinion, the arguments of petitioners are without merit. The rail-carrier association has participated in the proceedings from the beginning, and if petitioners desired more detailed information as to the specific membership of the association, they should not have waited until this late date. The contentions of the rail carriers adequately reflect their interest and position in the proceedings. The attorney preparing the motion, although different from the attorney participating at the hearing and the attorney preparing other pleadings in this proceeding, is a representative of the association or of a member thereof, and without evidence to the contrary, we must assume he was authorized to take the action he did. See *Illinois-Minnesota M. Car. Conference, Inc.*, v. *E. L. Murphy*, 64 M.C.C. 242, and the cases cited therein.

With respect to the motion of the Downing group and of the rail carriers to strike specific portions of the petition of applicants for reconsideration, we agree that most of the matter specifically complained of is immaterial, irrelevant, scandalous, or impertinent, and as such is objectionable and properly excludable under the provisions of rule 1.4(d) of the Commission's Rules of Practice. *Keith Ry. Equipment Co.* v. *Assn. of American Railroads*, 274 I.C.C. 469, 471, and *Gums and Resins from the East to the Pacific Coast*, 297 I.C.C. 435, 437. The motion of the Downing group and of the rail carriers to strike specific portions of the applicants' petition for reconsideration, to the extent any of those portions have not

been considered elsewhere in this report, will be granted.

As to the motion of petitioners to strike certain portions of the reply of the Bureau, we agree that the portions of such reply wherein reference is made to "wandering dissertation" and "unintelligible discussion" should be stricken from the record, and in this respect the motion of petitioners will be granted. We do not consider the other matter complained of as objectionable or beyond the scope of the interest of the Bureau in these proceedings, and the motion of petitioners in all other respects, will be denied.

Petitioners also request that certain portions of the reply of the Mutrie group be stricken from the record, as not supported by the evidence or beyond the scope of their interest in these proceedings. Particularly they object to statements made relative to matters involved in the investigation proceeding or to the nature of the operations performed by Gilbertville, prior to March 1953, such as:

> If the Interstate Commerce Act and the regulations of the Commission pursuant thereto are to be meaningful, the Commission must take a strong stand in withholding its approval, where it is obvious as it is here that applicants seek approval *nunc pro tunc* of a transaction which already is a *fiat accompli*. [sic]
>
> It seemed clear that Gilbertvillle's certificate could not have been transferred to Vendee in a Section 5 proceeding in March of 1953, or whatever time a member of the Nelson family actually acquired control, because the certificate was basically dormant at that time.

Petitioners assert that the said protestants presented no evidence in the investigation proceeding and that, as to the nature of the operations of Gilbertville prior to March 1953, they successfully prevented the

introduction of evidence at the hearing which would have established the continuity of such operations. It is true that the protestants presented no evidence in the investigation proceeding, and the question of the nature of the operations performed by Gilbertville prior to March 1953 is too remote to be controlling of our conclusions herein. However, the argument in the reply of protestants does not alter their basic position in the section 5 proceeding, and it is clear that their appearance and interest is in support of the Bureau in the investigation case. We do not consider any of the arguments in question as objectionable, requiring that it be stricken from the record. The motion of petitioners in this respect is overruled.

In their petition for reconsideration, petitioners argue that the division erred in finding that Nelson and Gilbertville had violated the provisions of section 206 and certain regulations of the Commission, in that it had conducted unlawful operations and failed to maintain safety equipment on vehicles or to keep vehicles in safe operating condition. They assert there is no evidence of record to sustain such conclusions; that these claimed violations, in any event, are not properly for consideration in these proceedings; and that the parties have been deprived of a full and complete hearing in violation of their constitutional rights. They further argue that the division erred in finding that Nelson and Gilbertville are controlled and managed in a common interest in violation of section 5(4), pointing out that the examiner, although reaching the same conclusion, had found the question to be a borderline case. They assert that the cases cited by the division to support its conclusions, particularly *Smithsons Holdings—Control—Ontario Frt. Lines Corp.*, 70 M.C.C. 623, and *Powell—Purchase—Rampy*, 57 M.C.C. 597, are

not in point, because no ulterior motive has been shown to exist as the basis for the purchase by Kenneth Nelson of the stock of Gilbertville, that he secured advice from other family members, or that the parties involved have been guilty of flagrant violations of the act and the regulations of the Commission. They contend that the fact that Gilbertville and Nelson shared the same facilities in Connecticut and the relationship of the parties was well known to the Commission prior to the filing of the section 5 application; that the division failed to give consideration to the efforts of both Nelson and Gilbertville to comply with all the rules and regulations of the Commission; and that the conclusion that the transaction in No. MC—F—6099 would not be consistent with the public interest is not supported by the weight and preponderance of the evidence.

Petitioners further argue that the division erred in finding that the protestant carriers who appeared in opposition to the section 5 transaction also appeared as interested parties in the investigation, contending, in this respect, that such protestants took no part or interest in the investigation proceeding, presented no evidence therein, and have not, in fact, alleged any violations of the act by either Nelson or Gilbertville. They allege that the division erred in substituting suspicion for facts in finding that, since March 1953, the stock of Gilbertville had been owned by Kenneth Nelson or those closely affiliated with him; in basing the unlawful common control conclusion on the activities of Kenneth Nelson prior to his purchase of the stock of Gilbertville, and on the division of interline revenues between Nelson and Gilbertville; and in, reaching its conclusions without considering that the applicants-respondents had received no prior warning that any of their activities

were unlawful, thereby depriving them of an opportunity to correct any deficiencies. They contend that the division erred in relying on suspicion and innuendo to justify the conclusions that applicants-respondents had violated the provisions of section 206 of the act and the regulations of the Commission; in failing to find that the transaction would be in the public interest; and in failing properly to consider the evidence of record and the supplemental data submitted with their exceptions to the examiner's report to justify the retention of authority for the transportation of sanitary napkins, facial tissues, and paper boxes, between New York, N.Y., and Wilmington, Del. Applicants-respondents further allege that the division should not use double standards to deny this application, involving small carriers, on the grounds of unlawful control, while on the other hand, finding consistent with the public interest an acquisition by the St. Louis-San Francisco Railway Company of stock control of the Central of Georgia Railway Company, and discontinuing an investigation proceeding involving those carriers in Finance Docket No. 19159, *Central of Georgia Ry. Co. Control,* 295 I.C.C. 563 (embracing docket No. 31977, Central of Georgia Railway Company Investigation of Control), hereinafter called the *Central of Georgia* case.[2]

[2] In a report on reconsideration in the *Central of Georgia* case, 307 I.C.C. 39, decided November 14, 1958, the Commission reversed the decision of July 9, 1957, by division 4, and denied the application of the St. Louis-San Francisco Railway Company for authority to acquire control of the Central of Georgia Railway Company through ownership of capital stock, and ordered that the St. Louis-San Francisco Railway Company terminate its power to control or manage the Central of Georgia Railway Company either through disposition of the stock to uninterested parties or the transfer thereof to a corporate

Lastly, they question the validity of the order of February 26, 1958, asserting that it demands that they cease violations of the act which are unknown, unlisted, and unspecified.

The Bureau and the protestant motor carriers, collectively and generally argue, in their replies, that the petitioners have failed to show wherein the division erred, and that its conclusions are adequately supported by the evidence of record and that its findings should be affrmed. They contend that the petitioners' allegations of error are not based upon facts but principaliy on false assumptions, unwarranted accusations, or incorrect, distorted, and unsupported arguments. The Bureau further contends that petitioners seek to misrepresent the true context of a stipulation between it and petitioners relative to the lawful observance by the carriers of an authorized gateway area; that the evidence, as detailed by the examiner in his report, clearly shows that the petitioning carriers have violated the act: that the parties cannot plead they were surprised by the investigation proceedings as they received adequate prior warning that the Commission questioned their relationship; that they were forewarned of the evidence to be presented by the Bureau in the investigation proceeding; that the act declares certain action to be unlawful per se and that whether the parties possessed ulterior motives is not controlling; that counsel for applicants-respondents would deprive the Commission of its right to receive evidence and make findings regarding fitness in a section 5 proceeding; that it is clear the application under section 5 was filed to legalize

---

trustee or trustees. The effective date of that order has been postponed to allow consideration of a petition for reconsideration.

an unlawful existing situation; that in the cases cited by applicants, wherein unlawful control existed and the applications were approved, mitigating circumstances existed, whereas none exist in the instant proceedings; that no public interest has been shown to justify approval of the section 5 application; and that a strong transportation system cannot be achieved by rewarding parties for their misconduct. Protestant motor carriers concur in the findings of the division and its rejection of data submitted by petitioners with their exceptions to the examiner's report purporting to show operations under Gilbertville's authority to transport sanitary napkins, facial tissues, and paper boxes. In our opinion, rejection of the data submitted by applicants-respondents with their exceptions was proper under rule 1.86 of the General Rules of Practice.

As stated in the prior report, none of the parties, including applicants-respondents, have disputed the factual statements of the examiner in his report, which were generally adopted in the prior report of the division. Petitioners, however, contend that such facts are not sufficient to justify the conclusion in the prior report that the control and management of Nelson and Gilbertville in a common interest had been accomplished and are continuing in violation of section 5. They contend that at most, a borderline case is presented as found by the examiner, and that, as a rule, the relationship of Gilbertville and Nelson, in their operations, as detailed in the prior report and the report of the examiner, are not unusual between motor carriers generally.

The evidence shows that Mrs. Linnea Nelson, with two of her seven children, Charles Chilberg and Oscar Chilberg, inaugurated the business of Nelson as a partnership in 1930. It was incorporated in

1947. As of May 14, 1948, of the 500 shares of authorized capital stock outstanding, 300 shares were held by Mrs. Nelson and 50 shares each by Charles, Oscar, Clifford, and Kenneth Nelson. Mrs. Nelson died in 1950 and her stock, less 6 shares which subsequently became treasury stock, was devised, 42 shares each, to her seven children. In June and September, 1951, and in January 1953, Oscar and Kenneth sold their stock (92 shares each) to Charles and Clifford, respectively, and resigned from the business. Since the latter date Charles and Clifford have held 226 shares each of the capital stock of Nelson. Kenneth and Oscar have been neither officers nor directors since 1951. However, from September 1, 1951, to March 1, 1953, Kenneth had an office at one of Nelson's terminals where as a "free lance" tariff consultant, he served only Nelson, and was paid by Nelson $15,650 in 1952 and $13,829 in 1953.

Under a contract of March 2, 1953, after consultation with his accountant and financial adviser, Kenneth agreed to purchase the capital stock of Gilbertville, consisting of 100 shares, for a net consideration of $22,447, of which $10,000 was evidenced by a promissory note signed by him and Oscar. A loan of $30,000 was secured from a bank on a note signed by the same individuals to help finance the transaction and to furnish Gilbertville with working capital. Upon the transfer of that stock 51 shares were held by Kenneth, 48 by Oscar, and 1 share by Kenneth's attorney. In March 1954, Oscar transferred his shares to Kenneth who, in turn, transferred 24 shares each to his wife and to the manager of their terminal at Gilbertville, apparently in name only.

The Bergson Company, organized in January 1953, is a real estate holding company, whose 490 shares of stock are owned in equal amounts by the seven children, and they are its directors. Kenneth is not an officer of Bergson. Of the five terminals utilized by Nelson in its operations, four are leased from Bergson, including a terminal at Rockville-Ellington, Conn., which is also used as the headquarters of both Nelson and Gilbertville. The latter subleases terminal facilities from Nelson at Rockville-Ellington, Newton, Mass., and Woonsocket, R.I., owned by Bergson, and at New York City, owned by other parties. At a garage and repair shop maintained at Rockville-Ellington, Nelson performs about 25 percent of the repair work on the equipment of Gilbertville.

At two of the terminals owned by Bergson, at the one in New York City, and at four other points, Nelson and Gilbertville have the same telephone numbers. The total cost of leased interterminal telephone lines is $1,100 a month and Gilbertville pays Nelson $400 a month as sublessee. Nelson occasionally leases equipment from Gilbertville, although the latter constantly and frequently leases from a pool of equipment maintained by Nelson. Both draw upon the same group of drivers, and information relative thereto, including medical certificates, is maintained in the files of both companies. To the extent that they interline, revenues are divided on a fixed percentage basis and Nelson does all of the billing for such traffic. Frequently the same driver will be employed by both companies during the same pay period, and on those occasions where a shipment moves from a point in the territory of one to a point in the territory of the other the same driver and vehicle will perform the through movement un-

der prearranged lease arrangements. The two companies use the same source for accounting and financial advice, each operates to some extent, at least, under managerial direction from officers of the other, and they are liberal with each other in the settlement of intercompany accounts. There has also been a commingling of traffic of the two carriers in the same vehicles whenever it suits their convenience.

As of March 1953, Gilbertville had one truck, three tractors, and four trailers, and had a deficit in surplus of $39,868. As of December 31, 1953, however, it had a net worth of $18,935. In 1953 Gilbertville's revenues were $75,489, whereas for the first 7 months of 1956 they had increased to $444,777. Its equipment increased substantially during that period. In 1953 the revenues of Nelson were $895,774, and for the first 7 months of 1956 they were $630,607. Under an authority granted by this Commission, Gilbertville, on June 16, 1954, acquired the operating rights of Louis Marner, doing business as Wolff's Express. In April or May of 1954, Charles Chilberg and Clifford Nelson negotiated for the capital stock of R. A. Byrnes, Incorporated, hereinafter called Byrnes, and upon approval of this Commission, the transaction was consummated August 21, 1956. The general commodity authority of Byrnes complements that of Gilbertville, and by interchange a through service on general commodities can be provided between points in Massachusetts, Rhode Island, and Connecticut, on the one hand, and, on the other, points south thereof to the District of Columbia. Considering all the facts of record, we are of the opinion, and find, that Kenneth Nelson was affiliated with Nelson within the meaning of section 5(6) at the time he purchased the stock of Gilbertville, and that the conclusive presumption of section 5(5) applies; we affirm the find-

ings in the prior report, and in the report of the examiner, that the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4) of the act.

It has been consistently found in many reports in proceedings under section 5, involving motor carriers, that a prior unlawful consummation of a transaction for which authority is sought, or the unlawful accomplishment of the control or management in a common interest of the carriers involved, is not an absolute bar to approval of the transaction. The law violation has been viewed as only one of the elements to be considered. A similar view has been expressed in determining applications for certificates under section 207 of the act, past violations of law by such applicants having been considered in appraising their fitness to hold the authority sought. Thus, some applications have been granted under section 5 in spite of the unlawful control, *Baggett—Control—Walker Hauling Co., Inc.*, 65 M.C.C. 522, *Masten Transp., Inc.—Merger*, 70 M.C.C. 421, and *Atlas Van-Lines, Inc.—Control and Merger*, 70 M.C.C. 629 and 75 M.C.C. 175; and some have been denied, *Hughes—Control—M.P. & St. L. Exp., Inc.*, 70 M.C.C. 261, *Deaton Truck Line, Inc.—Pur.—Capitol Freight Lines, Inc.*, 70 M.C.C. 355, and *Woodworth—Purchase—Griffin*, 70 M.C.C. 520. In a recent report on reconsideration, in Finance Docket No. 19159, *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39, where we found that the control of the Central of Georgia Railway Company had been acquired by the St. Louis-San Francisco Railway Company in violation of section 5(4), we stated, at page 43:

> We agree with division 4 that such violation is not necessarily a bar to approval of an application under section 5(2), if, upon consideration of all the facts, it clearly appears that the public interest will be served best by such approval. In our opinion, such is not the case here. The public interest is concerned not only with improvements in transportation service, but also with the maintenance of respect for and the observance of the law. If Frisco is permitted to retain the fruits of its unlawful conduct, and we sanction such conduct, which we consider to have been in flagrant disregard of the law, others will be encouraged to pursue a like course and to present a *fait accompli* for our approval. Obviously, such is not in accord with the intent of the statute, i.e., that we pass upon "proposed" acquisitions of control prior to their consummation, including the justness and reasonableness of the terms upon which such control is to be acquired. If the indicated practice were generally followed, our administration of the statute in the public interest would be seriously hindered, if not defeated.

We reaffirmed, in the foregoing, the view heretofore followed, that law violations are not necessarily a bar to approval of an application, if the public interest will best be served by approval of the transaction presented. In this respect, in the prior report of division 4, it was stated, at page 54:

> When regulation of motor-carrier transportation under the act was in its earlier stages, there were many instances when transactions under section 5 were approved, notwithstanding a showing of law violation, because the paramount public interest warranted approval. Now, after more than 20 years of regulatory experience, a more stringent approach is warranted, not as a penalty to these particular

> respondents, but in recognition that a violation of the law should not be rewarded, and that existing carriers endeavoring faithfully to comply with the law should be encouraged and protected. It should be emphasized that Nelson's and Gilbertville's principals are not new to transportation or to section 5 proceedings. * * * Considering all the circumstances, we are of the opinion that the violations of the law and of the regulations should not be "blessed" by approval * * * but rather, that respondents should be directed to terminate the unlawful control and management in a common interest.

We have carefully considered the evidence and the pleadings and find no error in the findings and conclusions in the prior report, or other basis upon which to arrive at a conclusion different than that reached in the *Central of Georgia* case, *supra,* or to support a finding that the transaction for which authority is sought would be consistent with the public interest under all the circumstances.

We find, in No. MC–F–6099, that the transaction has not been shown to be consistent with the public interest, and that the application accordingly should be denied.

We further find, in No. MC–F–6178, that the control and management of The L. Nelson & Sons Transportation Co., in a common interest with Gilbertville Trucking Co., Inc., has been effectuated and is continuing in violation of section 5(4) of the Interstate Commerce Act, and that the respondents The L. Nelson & Sons Transportation Co., Gilbertville Trucking Co., Inc., Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson participated in the effectuation of such control and management in a common interest and in its continuance.

An appropriate order, which will deny the application and require the respondents named above to terminate the violation of section 5(4) of the act, will be entered.

COMMISSIONER FREAS, concurring in the result:

I agree with the findings of the report that the control and management of Nelson in a common interest with Gilbertville has been effectuated in violation of section 5(4) of the act, that the transaction has not been shown to be consistent with the public interest, and that the application should, therefore, be denied. The latter conclusion is warranted, in my opinion, not so much because of any evidenced disregard of the law, but principally because of a lack of a clear showing that there is a paramount overriding public interest which would best be served by a grant of the approval sought.

COMMISSIONER HUTCHINSON, dissenting:

On the record as a whole I would find the transaction to be consistent with the public interest and affirm the findings in the report of the hearing examiner.

COMMISSIONER MCPHERSON, dissenting:

For the reasons set forth in the dissenting expression in *Central of Georgia Ry. Co. Control,* 307 I.C.C. 39, I would approve the application for control in No. MC–F–6099, and discontinue the investigation in No. MC–F–6178.

COMMISSIONER GOFF dissents.

COMMISSIONERS MITCHELL, ARPAIA, and WINCHELL did not participate.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 9th day of June, A.D. 1959.

No. MC-F-6099

THE L. NELSON & SONS TRANSPORTATION CO.—CONTROL AND MERGER—GILBERTVILLE TRUCKING CO., INC.

No. MC-F-6178

THE L. NELSON & SONS TRANSPORTATION CO.—INVESTIGATION OF CONTROL—GILBERTVILLE TRUCKING CO., INC.

Further investigation of the matters and things involved in these proceedings having been made, and the Commission, on the date hereof, having made and filed its report on reconsideration, which report, and the prior report of Division 4, dated February 26, 1958, are made a part hereof;

It is ordered, That the application in No. MC-F-6099 be, and it is hereby, denied.

It is further ordered, That, in No. MC-F-6178, respondents The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, and each of them, be, and they are hereby, required to terminate the violation of the provisions of section 5(4) of the Interstate Commerce Act, found in the said report to have been accomplished and to be continuing through the control or management of The L. Nelson & Sons Transportation Co. of Ellington, Conn., in a common interest with Gilbertville Trucking Co., Inc., of Gilbertville, Mass.

It is further ordered, That the said respondents be, and they are hereby, required to divest themselves of any and all interest which they may have in the capital stock of Gilbertville Trucking Co., Inc., *provided, however*, that in such divestment, none of the shares of stock shall be sold or transferred directly or indirectly to any stockholder, officer, director, employee, or agent of, or anyone otherwise directly or indirectly affiliated with or connected with or under the control or influence of The Nelson & Sons Transportation Co., or to any corporation in which it is financially interested or with which it is affiliated, or to any stockholder, officer, director, or employee of any such corporation, or its subsidiary or affiliated companies.

And it is further ordered, That The L. Nelson & Sons Transportation Co., and Gilbertville Trucking Co., Inc., both corporations, and Charles G. Chilsberg, Clifford J. O. Nelson, Greta C. Carlson, and Kenneth A. H. Nelson, individuals, shall report to this Commission, within 60 days from the date hereof, the steps taken by each of them to comply with the requirements of this order with respect to termination of the said violation of section 5(1) of the act.

By the Commission.

(SEAL) HAROLD D. McCOY, *Secretary*.